83-6567

filed April 10, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-_____

JOHN D. ARNOLD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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ATTORNEY FOR PETITIONER.

QUESTIONS PRESENTED

I. Whether the Petitioner was denied the Sixth Amendment right to counsel at his capital sentencing proceeding, when a jury view of the crime scene was conducted in the absence of the Petitioner and his court-appointed counsel?

II. Whether the Petitioner's sentence of death violates the Sixth, Eighth, and Fourteenth Amendments, when the Solicitor informed the jury that the aggravating circumstance of kidnapping in this case had already been appealed to the State Supreme Court and that Court had reversed the sentence on the ground that the Solicitor had made an error in jury argument; with the error depriving the Petitioner of a fair jury determination of punishment, interjecting arbitrary factors into the sentencing process, and denying the Petitioner due process of law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner John D. Arnold would respectfully request of this Court the issuance of a Writ of Certiorari to review the judgment of the South Carolina Supreme Court which was rendered in this case on January 17, 1984.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina has not yet been reported. State v. Plath, et al., ____ S.C. ____, ____ S.E.2d ____ (1984) (Opinion No. 22027 ____ filed January 17, 1984). It is reproduced in the Appendix to this Petition at A1-A12. The order of the South Carolina Supreme Court denying rehearing of Petitioner's appeal dated February 10, 1984, is unreported. It is reproduced in the Appendix attached hereto at A13.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 17, 1984. A timely Petition for Rehearing was filed and denied on February 10, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3),

Petitioner having asserted below and herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... and to have the assistance of counsel for his defense.

It also involves the Fourteenth Amendment to the United States Constitution which provides in part:

> "No state shall... deprive any person of life, liberty or property without due process of law...."

2. This case also involves S.C. Code Ann. §§16-3-20 et seq. (1983 Cum. Supp.), which statutory provisions are set forth in the Appendix to this Petition at A14-A17.

3. This case also involves the Sixth Amendment to the United States Constitution which states in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

4. This case likewise involves the Eighth Amendment to the United States Constitution which provides in part:

> ... nor cruel and unusual punishments [be] inflicted.

STATEMENT OF THE CASE

Petitioner John D. Arnold and a co-defendant, one John H. Plath, were convicted of the murder of Betty Gardner, a/k/a, Betty J. Adkins, who died on or about April 12, 1978. As a result of a jury recommendation, the Petitioner was sentenced to death for the murder of Ms. Gardner.

His conviction and sentence was appealed to the South Carolina Supreme Court, which appeal resulted in the affirmance of his conviction, but a reversal of his sentence of death. State v. Plath, et al., 277 S.C. 126, 284 S.E.2d 221 (1981). On remand for resentencing, a new sentencing

proceeding was conducted before a new jury which was impanelled pursuant to S.C. Code Ann. §16-3-25(E) (1983 Cum. Supp.). A sentence of death was again imposed, which sentence was affirmed by the Supreme Court of South Carolina. State v. Plath, et al., ____ S.C. ____ (Opinion No. 22027, filed January 17, 1984). The issues presented in this Petition for Writ of Certiorari arose during the Petitioner's resentencing proceeding.

At the Petitioner's resentencing proceeding, the State sought to establish that the Petitioner and his co-defendant Plath, while accompanied by two female accomplices picked up Ms. Gardner who was hitch-hiking at the time. Ms. Gardner willingly got into the automobile and was then driven to a wooded area near a dump site.

Subsequently, Ms. Gardner was forced to perform sexual acts with both Plath and his female accomplice, and was then alternately stomped, beaten, stabbed, and choked. It was the State's theory of the case that all four persons at one time or another participated in the physical abuse of Ms. Gardner. Ultimately, after Ms. Gardner had been left for dead, one of the female accomplices returned to the scene with law enforcement officials.

Neither of the female accomplices were prosecuted for any criminal offense arising out of the foregoing transaction. Additionally, the sole aggravating circumstance found to exist with regard to Petitioner Arnold was murder during the commission of a kidnapping.

During the course of the Petitioner's second sentencing proceeding, the State sought a jury view of the scene of the crime, stating to the trial judge that a jury view was important "particularly as to the kidnapping feature of it, it goes to show that they were at the most godforsaken place that there is in the world, I believe, to take this woman out to." Tr. 2142, ll. 1-3. Both counsel for the Petitioner and his co-defendant objected to the jury view, which objection was overruled by the trial court.

Immediately following the trial court's ruling, counsel for co-defendant Plath inquired as to whether the attorneys would be permitted to accompany the jury at the view of the scene. The trial court responded in the negative apparently on the grounds that attorneys for both co-defendants had been permitted to view the scene during a jury view which was conducted at the initial sentencing proceeding had in this case. Tr. 2142, ll. 8-13.

Subsequently, counsel for co-defendant Plath expressed a concern that some form of prejudice may occur during the jury view in the absence of counsel, Tr. 2143, l. 16 - 2144, l. 4, but the trial court maintained that it would make some arrangements which would be satisfactory to all concerned. Tr. 2144, ll. 5-8. Subsequent to a lunch break, the trial judge returned to the question of the jury view, and stated that the trial judge would visit the scene along with one Lieutenant Wagner, the head of the Detective's Bureau of the Beaufort County, South Carolina, Sheriff's Office. Counsel for Petitioner Arnold then indicated that he had no objection to the attendance of the trial judge and Lieutenant Wagner at the jury view, however, the issue of the presence of defense counsel was never reopened.

Eventually, a jury view of the scene was conducted without the presence of the Petitioner or his counsel. No recording or transcript was made of this proceeding and the record contains no indication of what events transpired. The jury found that the Petitioner had committed the murder of Ms. Gardner while in the commission of a kidnapping and sentenced him to death therefore.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW: QUESTION I

Counsel's presence at the jury view was initially raised at the sentencing proceeding. In unambiguous terms the trial court responded in the negative when presented with the inquiry as to whether the attorneys would be

permitted to attend the view. This ruling by the trial court was presented to the South Carolina Supreme Court in a Supplemental Memorandum of Law filed by Petitioner Arnold and his co-defendant. The Petitioner argued that the

> the trial judge's action in denying the defense request that counsel be permitted to accompany the jury when it was taken to the scene of the crime denied them their Sixth Amendment right to the assistance of counsel at that critical stage of the proceedings against them. In addition, because Appellants' rights at the jury view were not protected by the presence of counsel, and because no record of the proceedings at the scene was made, the conducting of the jury view outside of the presence of Appellants' themselves denied them their constitutional right to be present at their own trial, in violation of the Sixth and Fourteenth Amendments.

State of South Carolina v. John H. Plath and John D. Arnold, Appellants' Supplemental Memorandum of Law, at 3.

The State responded to the Petitioner's Supplemental Memorandum of Law asserting that the use of a procedural bar would be appropriate in this case but should the Court consider the error pursuant to the doctrine in favorem vitae, the case of Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) stood for the proposition that "there is no necessity for the presence of counsel where the entire jury view is under the direction of the trial judge in the absence of counsel for both the State and Defendant." Respondent's Return to Appellants' Supplemental Memorandum of Law at p. 3.

In treating the issue on appeal, the South Carolina Supreme Court stated

> at no time did counsel for the Appellants request permission to accompany the jury or to have the Appellants do so. All arrangements for the jury view were thoroughly discussed with counsel in the presence of the Defendants, and no hint of opposition on their part was expressed.

Then, after noting that Snyder v. Massachusetts, supra, held that a jury view of the crime scene does not constitute part

of a trial for purposes of the defendant's due process right to be present, the Court held

> constitutional protections are not implicated or denied when, as here, the trial judge in fact accompanies the jury in the absence of defendants and their counsel, there having been neither an objection to the arrangement nor even a request to be taken along.

Notwithstanding the Court's statement that there was no request to accompany the jury on its view of the scene, as noted above, the record reflects that counsel did inquire as to whether the trial judge would permit the attorneys to accompany the jury on the view, and that the trial judge responded in unambiguous fashion "no, sir". Tr. 2142, ll. 8-13. Consequently, the Petitioner filed a timely Petition for Rehearing with the South Carolina Supreme Court requesting to be heard on

> the constitutional implications of denying an accused both the right to attend, and to have counsel attend, a jury view of the subject crime scene held during a capital sentencing proceeding.

State of South Carolina v. John H. Plath and John D. Arnold, Petition for Rehearing of Appellant Arnold at p. 7. This request for rehearing was denied without opinion on February 10, 1984.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW: QUESTION II

In his initial guilt phase proceeding, the Petitioner was tried for and convicted of murder, but not kidnapping. In the first penalty phase which followed the Appellant's conviction, however, murder in the commission of kidnapping was submitted to the jury and was found by that jury to exist as a statutory aggravating circumstance. Thus, when the South Carolina Supreme Court affirmed the Petitioner's conviction but vacated his sentence of death to remand his case for a new penalty proceeding, see State v. Plath, et al., 277 S.C. 126, 284 S.E.2d 221, 231 (1981), the previous

finding of the statutory aggravating circumstance of kidnapping became a nullity.

However, during the Solicitor's argument to the jury he stated inter alia

> Now, you don't have to worry about [the guilt] phase of the case because a jury has already... convicted these people of murder which is the killing of a person with malice aforethought, either express or implied and that verdict has been affirmed by the South Carolina Supreme Court... you have just got to consider their punishment. It was sent back because I made an error in arguing to the jury. I told them something that I shouldn't have told them and they sent it back for that purpose and that's your sole thing. Tr. 2425, ll. 2-12.

Then, the Solicitor continued his argument concerning the statutory aggravating circumstance of kidnapping. The Solicitor stated

> Now let's see whether there are any aggravating circumstances in this case. We maintain number one, that they are guilty of kidnapping or they were kidnapping during the time of it. Tr. 2425, ll. 13-16.

At this point in his argument, the Solicitor defined for the jury the statutory offense of kidnapping and immediately made the following comment.

> We claim that was kidnapping. And that particular thing was appealed to the Supreme Court and they said they didn't upset it on that ground. Tr. 2425, l. 24 - tr. 2426, l. 2.

On appeal to the South Carolina Supreme Court, the Petitioner argued that the Solicitor's closing argument interjected arbitrary factors into the sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the Petitioner had been denied a fair determination of his sentence. In its opinion, the State Supreme Court treated the Petitioner's argument in the following manner.

> Appellants' interpret the argument as an effort to invoke the authority of this Court to preclude an independent jury determination on the

> aggravating circumstance of kidnapping. We find, however, that the passages complained of are not susceptible to this interpretation but are instead simply efforts by the State to explain the function of the jury at this trial and to argue to the jury the elements of kidnapping which the State had sought to prove. State v. Plath, et al., ___ S.C. ___ (Opinion No. 22027 filed January 17, 1984).

The Petitioner filed a timely Petition for Rehearing on this issue stating

> The jury function at this trial in no way encompassed a consideration of the prior appeal taken by the Appellant to this Court, and the ruling of this Court "that didn't upset [the prior sentence of death] on [kidnapping] ground[s].

And the additional grounds that

> Even if the Solicitor's statement concerning the prior appeal was an effort to achieve the legitimate end of instructing on the elements of kidnapping, it interjected arbitrary and improper considerations into the sentencing process which were not justified by the means employed.

The Petitioner's Rehearing Petition was denied by the South Carolina Supreme Court on February 10, 1984, without opinion.

REASONS FOR GRANTING THE WRIT: QUESTION I

This Petition presents a question which has potential applicability to every individual who stands convicted of a capital offense in the United States, when the crime scene becomes relevant to the issue of punishment. Furthermore, this Court has not dealt with an issue involving the constitutional rights of an accused at a jury view of a crime scene since this Court's opinion in Snyder v. Massachusetts, 291 U.S. 917 (1934). This Court has never dealt with the issue of the Sixth Amendment's right to counsel at a jury view held during a capital (or non-capital) sentencing proceeding, and the Supreme Court of South Carolina has held that "constitutional protections are not implicated or denied [when a jury view is conducted] in the absence of the

defendants and their counsel." State v. Plath, et al., ____ S.C. ____ (Op. No. 22027 filed January 17, 1984).

Decisions of this Court which have treated the Sixth Amendment right to counsel strongly indicate that the Supreme Court of South Carolina was in error when it refused to acknowledge the right of a capital defendant to have the assistance of counsel at a jury view proceeding. See e.g. Mempa v. Rhay, 389 U.S. 128 (1967) (the right to counsel extends to every stage of the proceeding where substantial rights may be affected, including sentencing). The jury view and all relevant dialogue followed in the wake of both the trial judge's unambiguous ruling that counsel would not be permitted to attend the view, and Petitioner's objection to the view in the first instance. Consequently, the South Carolina Supreme Court's reference to a lack of objection by the Petitioner to subsequent "arrangements" in no way undermines the magnitude of the error asserted here.[1]

Every phase of the Petitioner's sentencing trial encompassed the issue of whether the Petitioner should receive life imprisonment, or death by electrocution. The State Solicitor argued that the jury view had relevance to the issue of punishment because it "particularly" related to the alleged aggravated circumstance of kidnapping. Tr. 2142, ll. 1-3. Petitioner submits that the right to counsel attached to every stage of the proceeding which bore relevance to the issue of punishment.

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[1]Under South Carolina procedure, the Petitioner was not required to reopen or reassert his right to have counsel present once he had sought and obtained an unambiguous ruling from the trial court on the issue. See State v. Grant, 275 S.C. 411, 272 S.E.2d 169 (1980); South Carolina Circuit Court Practice Rule 11. Petitioner in no way asserts that the South Carolina Supreme Court misapplied its own precedent, or rules of trial procedure. The state court's opinion did not invoke a procedural bar to reaching the merits of the asserted claim, but rather gauged the merits of the constitutional issue by the presence or absence of objection to related but collateral considerations.

Substantial rights of the Petitioner could have been affected in every way from express prejudicial, incorrect or improper remarks by the officers who were charged with the showing proper, Mempa v. Rhay, supra, to prejudice which could have occurred in an unknowable and unascertainable manner and magnitude in the absence of the Petitioner and his counsel.

Several hours elapsed during w' .ch the jury was assembled together with the trial judge and head police detective while en route to, at, and en route from the crime scene. Thus, with no recording or transcription of this procedure, coupled with the absence of counsel, a substantial gap exists in the sentencing procedure on a matter which bore "particular" relevance to the issue of punishment.

Neither the State of South Carolina, nor the South Carolina Supreme Court has advanced any reason as to why the Petitioner should have been denied the right to have counsel attend the view. However, valid considerations do exist which support the Petitioner's claim that counsel should have been made available. Counsel would have been in a position to exercise informed judgment with regard to the presentation of evidence in mitigation of punishment which related to what the jurors had seen during the jury view of the crime scene, and counsel could have exercised informed judgment as to whether the jury view of the crime scene warranted counsel's attention during closing argument. Cf. Herring v. New York, 422 U.S. 853 (1975) (the right to assistance of counsel includes the right to be heard in summation). Instead, counsel could not exercise informed judgment with regards to either of the foregoing considerations because he was denied the right to be present at the scene of the crime while the jury was in attendance.

In addition to relying on this Court's opinion in Snyder v. Massachusetts, supra, the State Supreme Court relied on its decision in State v. Suber, 89 S.C. 100, 71 S.E. 466 (1911) for the proposition that "a jury view of the

scene is not a taking of testimony." State v. Plath, et al., (Opinion No. 22027 filed January 17, 1984). However, Petitioner submits that whether the jury view was testimonial in nature is not the controlling consideration. In this case, the sole aggravating circumstance which was found against Petitioner Arnold was murder while in the commission of a kidnapping. The Solicitor argued that the jury view was important "particularly as to the kidnapping feature." Tr 2142, l. 1. Thus it was the purported importance of the view which becomes the controlling consideration, we submit. The jury view procedure became a consideration which in part formed the basis for the aggravating circumstance and, thus, for the sentence of death which was ultimately imposed upon the Petitioner. The right to counsel cases which have been decided by this court well subsequent to the right to be present issue in Snyder v. Massachusetts, supra, do not turn upon the presence or absence of the taking of testimony. Rather, it is the importance or nature of the stage of the procedure against the accused which triggers the right to counsel, and the assurance that the accused will not stand alone against the State in any circumstance where the right to a fair trial could be implicated and impaired. Thus, counsel is afforded at pretrial identification procedures, United States v. Wade, 388 U.S. 218 (1967); in custodial pretrial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966); arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961); preliminary hearing, White v. Maryland, 373 U.S. 59 (1963); sentencing, Mempa v. Rhay, supra; and appeal, Douglas v. California, 372 U.S. 353 (1963).

Furthermore, there is no indication in this Court's opinion in Snyder v. Massachusetts, supra, that the same result would have been reached had counsel's presence been denied as well as the Petitioner's. To the contrary, Snyder was given court-appointed counsel for the express purpose of representing the accused "at the place to be viewed," 291 U.S. 97, 103, and the jury was accompanied by a court

stenographer as well. 291 U.S. at 103. Neither protection was afforded this Petitioner, and to the degree Snyder was relied upon by the South Carolina Supreme Court, it is simply not controlling. See United States v. Walls, 443 F.2d 1220 (Sixth Cir. 1971) at note 3, F.2d at 1223.

Because the proceeding below presented the sole issue of punishment, Petitioner submits that it is not possible to determine whether the error at issue was harmless beyond a reasonable doubt. A recommended sentence of death may be returned upon a finding of at least one statutory aggravating circumstance, S.C. Code Ann. §16-3-20(C) (Cum. Supp. 1983), however, upon such a finding, a life sentence may nevertheless be recommended by the jury, which recommendation becomes binding on the trial court. S.C. Code Ann. §16-3-20(C) (Cum. Supp. 1983). Consequently, under the South Carolina capital sentencing statutory scheme, it is not possible to determine what affect the absence of defense counsel at any stage of the proceeding would have upon a jury's sentence recommendation. Therefore, Petitioner submits that the harmless error test allowed by Chapman v. California, 386 U.S. 18 (1967) would not show the error complained of herein to be harmless beyond a reasonable doubt, even if it were held to be properly applied in this case.

This Court's recent opinion in Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983) is readily distinguishable from the Petitioner's proceeding. In Rushen v. Spain, supra, there existed two ex parte communications between one juror and the trial judge. This Court held that any prejudicial effect resulting from the ex parte communications could adequately be determined by a post-trial hearing. Petitioner submits that a denial of counsel for the extended period of the jury view and the speculative nature of that error, Glasser v. United States, 315 U.S. 60 (1942) is not a proper subject for post-trial hearing.

Moreover, the South Carolina Supreme Court has taken the position that no error occurred in the first instance. Consequently, no such hearing has been held, and Petitioner asserts that the twelve jurors themselves could not be consciously aware of any effect that counsel could have had on his or her respective vote even if such a procedure were ordered.

REASONS FOR GRANTING THE WRIT: QUESTION II

This Court has never considered the question of whether a jury which has been impanelled solely for a capital sentencing proceeding, may be informed by the State Solicitor that (1) the aggravating circumstance at issue has already been passed upon by a prior jury and found to exist; (2) the issue had been appealed to the State Supreme Court and found to be free from error, and (3) the instant or second jury was asked to consider the same question only because of erroneous jury argument which had been made by the Solicitor. The Petitioner submits that the foregoing is an accurate synopsis of the Solicitor's argument in this case and that the error denied the Petitioner a fair and independent jury determination of the appropriate punishment in this case in violation of the Sixth and Fourteenth Amendments; and interjected an arbitrary factor into the sentencing process in violation of the Eighth Amendment.

The Supreme Court of South Carolina held that the Solicitor's argument in this case was proper, which holding is contrary to prior decisions of this Court, Petitioner submits. State v. Plath et al., supra.

In Kercheval v. United States, 274 U.S. 220 (1927) this Court held that when a plea of guilty is set aside and withdrawn, that plea may not be introduced as evidence of guilt at a subsequent trial for that same offense. With regard to the prior plea, this Court stated

> ... it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has

> nothing to do but give judgment and sentence. 274 U.S. 220 at 223.

Then with regard to the use of the prior plea as evidence of guilt this Court stated

> [t]he effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. By permitting it to be given weight the court reinstated it pro tanto. 274 U.S. 220 at 224.

Petitioner submits that this is the type of error which is embodied in the Solicitor's jury argument. The jury was told in effect that a prior jury had already deliberated on the aggravating circumstance of kidnapping and found it to have been present in the Petitioner's case. To worsen matters, the Solicitor then told the jury implicitly that the State Supreme Court had agreed by reversing only on the ground of erroneous jury argument which had been made by that same Solicitor.

The Solicitor's argument deprived the Petitioner of the right to an independent determination by the second jury of the issue of appropriate punishment in this case as provided by S.C. Code Ann. §16-3-25(E) (Cum. Supp. 1983). The Sixth Amendment right to a fair jury determination includes the right to have that determination made as a result of evidence which comes from the witness stand with full protection of confrontation and cross-examination. Turner v. Louisiana, 379 U.S. 466 (1965). It likewise includes the right to have a jury which is comprised of a panel of "impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717 (1961). Therefore, where it is shown that there exists a pattern of deep and bitter prejudice, a juror's statement that he or she will be fair is not sufficient. Irvin v. Dowd, supra, 366 U.S. at 727-28.

Petitioner submits that the Solicitor's argument in the instant case would generate and exceed the prejudice which flows from pretrial or midtrial publicity. The prejudice

would have every reason to take on the identical character of the conclusive jury verdict to which this Court referred in Kercheval, supra, and which constitutes reversible error. The entire jury was exposed to the Solicitor's improper argument simultaneously in open court. The Solicitor's statement carried the full weight of the authority of his official office, Berger v. United States, 295 U.S. 78 (1935); and it could well have been conclusive in its effect on the jury with regards to the presence of the single circumstance in aggravation which it returned. Kercheval, supra, cf Irvin v. Dowd, supra.

A fair jury determination is denied when a second jury is told that the accused has already been convicted of the offense for which he or she then stands trial. Kercheval v. United States, supra; United States v. Williams, 568 F.2d 464 (Fifth Cir. 1978) (resulting from midtrial publicity); Arthur v. Bordenkircher, 715 F.2d 118 (Fourth Cir. 1983). In Arthur v. Bordenkircher, a Fourth Circuit panel found defense counsel to have been ineffective as a result of informing his client's second jury that a first conviction for the same offense had been reversed upon procedural grounds. The court noted

> indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged. 715 F.2d at 119. Citing Williams, supra.

In this Petitioner's case, the jury was actually told more than counsel related to the jury in the second Arthur proceeding, for there, there was no mention that the sufficiency of evidence as to the offense charged was expressly made part of the accused's direct appeal. Here, however, that was precisely the point of the Solicitor's argument. Tr. 2425, l. 13 - tr. 2426, l. 2.

Because kidnapping was the only aggravating circumstance found to have existed in the Petitioner's case, it is apparent that the Solicitor's argument reasonably could have

contributed to the jury's finding of fact, and its recommendation of death. This Sixth and Fourteenth Amendment violation invalidates the Petitioner's sentence of death.

Eighth Amendment: Arbitrary Factor

The sentencing phase of the capital murder trial in South Carolina presents a unique situation. A jury may recommend a life sentence regardless of what circumstances of aggravation the State's case proves. Thus, confronted with the monumental choice of life or death, the jury possesses considerable discretion. Likewise, South Carolina's capital sentencing scheme must shelter the jury's extremely difficult and discretionary task from capricious impulses. It does this by mandating that the sentencing decision not be affected by "passion, prejudice, or other arbitrary factors." S.C. Code Ann. §16-3-20(C).

In like manner, this Court has indicated that any capital sentencing scheme, in order to be constitutional, "must channel the sentencer's discretion by clear and objective standards that provides specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980), quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); and Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

The Solicitor's argument in the instant case literally invited the jury to refrain from exercising its discretion in favor of reliance on the prior jury's determination of the presence of an aggravating circumstance, and the State Supreme Court's opinion on appeal which left that finding undisturbed. Therefore, because the Solicitor's argument diverted the sentencing authority's attention from the evidence which had been presented from the witness stand in open court, the Petitioner submits that his sentence of death was imposed by a procedure which was infected by an

arbitrary factor in violation of the Eighth Amendment to the United States Constitution.

CONCLUSION

The Petition for Writ of Certiorari should properly issue.

Respectfully submitted,

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ATTORNEY FOR PETITIONER.

April 10, 1984.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

John H. Plath and John D. Arnold, ... Appellants.

Appeal From Beaufort County
Luke N. Brown, Jr., Judge

Opinion No. 22027
Heard September 12 1983 Filed January 17, 1984

AFFIRMED

David I. Bruck, of Columbia; Joseph R. Barker, of Hilton Head; and Peter L. Fuge, of Beaufort; and Assistant Appellate Defender William Isaac Diggs, of S. C. Commission of Appellate Defense, of Columbia; and Ralph V. Baldwin, Jr., and C. Scott Graber, both of Beaufort, for appellants.

Attorney General T. Travis Medlock, Assistant Attorney General Harold M. Coombs, Jr., and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia, for respondent.

LEWIS, C.J.: Upon a previous trial, appellants were convicted of murder and were sentenced to death, the jury having found that the murder was perpetrated while in the commission of kidnapping. See Section 16-3-20(C)(a)(1)(c), Code of Laws of South Carolina, 1976. This Court affirmed the convictions but remanded the case for retrial as to sentence. State v. Plath, 277 S. C. 126, 284 S. E. 2d 221. Appellants have again been sentenced to death: Arnold, upon a jury finding of kidnapping; Plath, upon jury findings of kidnapping and assault with intent to ravish. Section 16-3-20(C)(a)(1)(b) and (c), Code. We affirm the sentences.

Appellants claim that errors arose at four points in the trial: (1) in the disqualification of certain jurors; (2) in certain evidentiary rulings by the trial court; (3) in certain conduct of the Solicitor; and (4) in the submission of aggravating circumstances to the jury. Under each of these headings multiple exceptions are presented.

(1) Disqualification of Jurors.

It is contended that three specific jurors were excused in violation of the requirements established by Witherspoon v. Illinios, 391 US 510, 88 S Ct 1770, 20 L Ed 2d 776. The first of these jurors was questioned by defense counsel concerning his ability to "consider" the death penalty. This Court has repeatedly said that the test of a juror's qualification under 16-3-20(E), Code, is the ability to both reach a verdict of either guilt or

innocence and to, if necessary, vote for a sentence of death. The ability to merely "consider" these possibilities is not sufficient to qualify a prospective juror. State v. Tyner, 273 S. C. 646, 651, 258 S.E. 2d 559, 562; State v. Goolsby, 275 S. C. 110, 116, 268 S. E. 2d 31, 35; State v. Linder, 276 S. C. 304, 313, 278 S. E. 2d 335, 340; State v. Hyman, 276 S. C. 559, 563, 281 S. E. 2d 209, 211-212; State v. Owens, 277 S. C. 189, 192, 284 S. E. 2d 584, 586; State v. Koon, 278 S. C. 528, 532, 298 S. E. 2d 769, 771; State v. Copeland, 278 S. C. 572, 579, 300 S. E. 2d 63, 67, cert. denied, ___ US ___, 103 S Ct 1802, 76 L Ed 2d 367.

This same juror was in due course asked the appropriate questions by the trial court--

Question: . . . Would you vote for the death penalty--

Answer: No, sir.

Question: --and write your name?

Answer: No sir, no sir.

We find these responses fully warranted disqualification of the juror.

The next juror was a retired official of the United States government who appeared experienced, well informed and quite capable of articulating his beliefs. He stated flatly, "Your Honor, I feel as though I could not recommend death, whatever the circumstances." He was then asked, "it's your feeling that you could never bring in the death penalty?" To this he responded, "That is correct, sir." It is significant that no objection was made to dismissal of this juror and that, in fact, counsel for defendant Plath declined to question him, stating, "we are not going to waste his time." In like manner, the third juror was excused without objection after she repeatedly and emphatically stated she could not put a defendant to death.

We take note of the acquiescence by defense counsel because the context of these disqualifications is important. In this trial over one hundred prospective jurors were interviewed, each being questioned at great length and in depth on a wide range of topics. Subsequent to this trial, our Court announced two opinions emphasizing the authority and duty of trial judges to focus the scope of voir dire upon matters enumerated in Section 14-7-1020, Code, and to eliminate excessive intrusions upon the privacy of prospective jurors. State v. Koon, 278 S. C. 528, 532, 298 S. E. 2d 769, 771; State v. Smart, 278 S. C. 515, 522-523, 299 S. E. 2d 686, 690-691, cert. denied ___ US ___, 103 S Ct 1784, 76 L Ed 2d 353.

These appellants were granted leave to examine jurors far above and beyond any constitutional and statutory entitlements. We note in passing that of the twelve members of the panel which actually served in this case, five members during voir dire expressed serious reservations about capital punishment and/or a preference for life imprisonment. Two others stressed the gravity of the decision they faced and expressed a very strong desire to base the decision upon

complete and convincing evidence. We are impressed by the singular fairness and impartiality of this jury panel and are satisfied that the disqualifications of which the appellants complain were proper, in accordance with law, and in no way worked to their prejudice.

(2) Evidentiary Rulings.

Multiple errors are claimed under this heading: (a) introduction of each appellant's criminal record; (b) refusal to admit a tape cassette offered by appellant Plath; (c) reference on cross-examination to other death penalty trials; and (d) conduct of the jury visit to the scene of the crime.

(a) Appellant Arnold offered in mitigation the testimony of Dr. Peter Neidig, a clinical psychologist, who related his assessment of the defendant based upon personal interviews. On direct examination the witness disclosed what he had learned about Arnold's juvenile offenses. On cross-examination the State continued the inquiry and brought to light Arnold's adult offenses together with the fact that he was an escapee at the time he committed this murder. Defense objected to the inquiry, while admitting the "door" had been "opened" to it, and was properly overruled. The State is not required to accept, without cross-examination, a partial history such as was here presented by the defendant. State v. Allen, 266 S. C. 468, 484, 224 S. E. 2d 881. Dr. Neidig himself stated that he had reviewed with Arnold the entire course of his criminal career. Thus the testimony of the witness was left incomplete and fragmentary by the defendant and was only made whole through subsequent inquiry by the State. We find no abuse of discretion in the trial court's ruling on this point.

The criminal record of appellant Plath came into evidence by a different route. At the original trial of this case, appellant Plath took the witness stand during the guilt phase and on direct examination revealed his own prior criminal record. He now complains that this same information, exactly as he volunteered it, was placed before the jury in the sentencing trial presently on appeal.

One of Plath's chief witnesses in mitigation was Officer Charles Robertson of the City Police Department in York, Pennsylvania. On direct examination, Officer Robertson testified in some detail concerning Plath's criminal record, all for the purpose of explaining how he came to know the defendant and in order to then discuss Plath's subsequent religious activities. Significantly, the State did not cross-examine this witness concerning appellant's record. We are at a loss to understand how Plath can complain about the admission of his criminal record when the same information would have inevitably been introduced in the course of his own showing in mitigation.

This Court has given serious consideration to the complaints of both appellants because they reflect a profound misconception of the capital sentencing trial as such. Section 16-3-20(B), Code, governs original trials as to sentence: "In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Section 16-3-25(E), Code, provides for retrial as to sentence, such as here occurred:

> In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

Information as to a defendant's record of previous criminal convictions has always been deemed relevant to the process of imposing sentence upon a plea or verdict of guilt. So fundamental is this proposition that it requires no citation of authority, but we note in passing that the current A. B. A. Standards for Criminal Justice assume the relevance of such information in guidelines on jury trials (Standard 15-3.4) and on presentence reports (Standard 18-5.1). Appellants place a wholly misconceived reliance upon Henry v. Wainwright, 661 F. 2d 56, for no claim is made that a prior criminal record constitutes an "aggravating circumstance" in South Carolina.

The position taken by appellants would lead to an inconsistent result: the defendant convicted of an aggravated murder would enjoy greater protection in the determination of his sentence than a defendant found guilty of far lesser offenses. We decline to adopt such a view and instead hold that information concerning prior criminal convictions shall be admissible as additional evidence during the sentencing or resentencing phase of a capital trial under our statute.

We find, therefore, that Plath's criminal record was properly admitted in accordance with our statute and the course of the previous conviction trial.

(b) Appellant Plath offered testimony of several witnesses to his jailhouse religious conversion and to his subsequent good works of Christian devotion. Apparently Plath made or took part in making two inspirational tape cassettes for use in instructional programs aimed at youthful offenders. He declined to introduce one of the tapes, contending it contained prejudicial matter, and he was successful in preventing its admission by the State. In turn, when Plath offered the second tape, the Solicitor objected, and the objection was sustained. Thus, neither tape was played to the jury, and Plath claims error in the second (but not the first) ruling of the trial court.

We find neither an abuse of discretion nor any prejudice to the appellant. The jury heard at great length about appellant's religious pursuits, including the tapes, and the beneficial results thereof. The jury had every opportunity to weigh these matters in mitigation. Actual playing of the tapes would have been merely cumulative and would in effect have constituted self-serving, unsworn testimony by the appellant which he had no right to offer.

(c) Appellant Arnold objects to the cross-examination of his expert witnesses in which other death penalty trials were mentioned by name. Apparently these witnesses had presented similar testimony in other cases, to no avail it seems since those defendants also were sentenced to death. Arnold now argues that reference to other capital cases introduced an arbitrary factor into this trial.

The testimony at issue concerned the effectiveness and propriety of capital punishment. This Court has held such testimony to be improper and impermissible. State v. Gilbert, 277 S. C. 53, 58, 283 S. E. 2d 179, 181, cert. denied, 456 US 984, 102 S Ct 2258, 72 L Ed 2d 863; State v. Woomer, 278 S. C. 468, 473, 299 S. E. 2d 317, 320, cert. denied, _____ US _____, 103 S Ct 3572, 77 L Ed 2d 1413. Assuming, however, that the defendants were permitted to attack capital punishment broadside, it was not improper for the State to cross-examine defense experts as necessary to reveal the bases and weaknesses of their testimony. State v. Plath, 277 S. C. 126, 141, 284 S. E. 2d 221, 229.

Arnold's experts testified to declining execution rates and claimed to have discovered an international trend away from capital punishment. In light of these global assertions, it was a proper response for the State to point out that the same experts had themselves been unable to persuade a few dozen jurors across the State. We see no merit in the appellant's claim of prejudice.

(d) Appellants allege error in the conduct of the jury visit to the scene of the crime. At trial, counsel for the appellants opposed the State's motion for a jury view, which objection was overruled in the proper exercise of the court's discretion. See Section 14-7-1320, Code of Laws of South Carolina, 1976. At no time did counsel for the appellants request permission to accompany the jury or to have the appellants do so. All arrangements for the jury view were thoroughly discussed with counsel in the presence of the defendants, and no hint of opposition on their part was expressed. Indeed, the record reflects that shortly before this colloquy, counsel for appellant Plath requested that the next day's proceedings commence later than usual to enable him to consult with witnesses. This particular request was denied, yet the effect of the jury view without counsel or defendants created the delay they had actually sought.

Appellants contend that the jury view in their absence and that of counsel worked a denial of constitutional rights to counsel and confrontation. Appellants acknowledge that in Snyder v. Massachussetts, 291 US 97, 54 S Ct 330, 78 L Ed 674, the United States Supreme Court held that a jury view of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present. With specific regard to the simple inspection such as here occurred, Justice Cardozo wrote for the Snyder majority:

> The Fourteenth Amendment does not assure to a defendant the privilege to be present at such a time. There is nothing he could do if he were there, and almost nothing he could gain . . . If the risk of injustice to the prisoner is shadowy at its greatest, it ceases to be even a shadow when he admits that the jurors were brought to the right place and shown what it was right to see.

291 US at 108, 54 S Ct at 333, 78 L Ed at 679-680.

Despite the passage of almost fifty years since the Snyder decision, the appellants can direct us to no federal decision that has yet determined a case of this sort raises constitutional principles. The only federal case cited

by appellants is U.S. v. Walls, 443 F. 2d 1220, in which the court expressly declined to rule on constitutional issues and instead rested its reversal upon the power to supervise other federal courts.

We adhere to this Court's holding in State v. Suber, 89 S. C. 100, 106, 71 S. E. 466, that a jury view of the scene is not a taking of testimony. Constitutional protections are not implicated or denied when, as here, the trial judge in fact accompanies the jury in the absence of defendants and their counsel, there having been neither an objection to the arrangement nor even a request to be taken along. With respect to this exception of appellants, the conclusion of Justice Cardozo's Snyder opinion merits some thought:

> There is danger that the criminal law will be brought into contempt--that discredit will even touch the great immunities assured by the Fourteenth Amendment--if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law . . . .

291 US at 122, 54 S Ct at 338, 78 L Ed at 687.

(3) Misconduct of the Solicitor

Appellants contend they suffered prejudice by reason of prosecutorial misconduct in several particulars: (a) cross-examination and jury argument suggesting appellants might escape or be released unless put to death; (b) jury argument concerning appellants' failure to testify; (c) jury argument referring to this Court's opinion in State v. Plath, 277 S. C. 126, 284 S. E. 2d 221; (d) generally inflammatory speech in closing argument.

(a) Two episodes of cross-examination are involved in this appeal. The first incident occurred after the direct examination of Professor Bruce Pearson, an anthropologist at the University of South Carolina, whose opinion was that life imprisonment represented a mode of expressing societal disapproval superior to capital punishment. Counsel for Arnold specifically questioned the witness about life imprisonment in South Carolina as he had observed it in the course of five years as a regular, weekly visitor to the Central Correctional Institute in Columbia. The following passage is illustrative (with emphasis added):

> Question: Now, should this jury bring back a life imprisonment verdict, would John move into other quarters?
>
> Answer: Well, as the prison is now set up, people serving life terms would be sent to either the old cell block or one of the barrack type wards.
>
> Question: Would John's life or quality of living actually improve if he went into the general population or would it even get worse?

Answer: Well, it's hard to say . . . when you know that they are going to lock the key and close the door behind you and you are not going to leave [it] doesn't make too much difference if they have you in a big luxury hotel, if you were locked in, it would still be a prison and I can assure that CCI is not a luxury hotel.

Question: If Mr. Arnold went to general population, would his life improve markedly?

Answer: Well, that's a difficult question to answer. In some ways it would improve but in other ways it would remain the same, I think.

Question: We are still dealing with loss of liberty.

Answer: That's right.

Immediately following this exchange, and in response to questions by counsel for Plath, the witness described life imprisonment as a form of slavery.

Clearly the thrust of this defense testimony was to demonstrate the permanence and deprivation entailed in life imprisonment. Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely. In the course of this inquiry the allegedly prejudicial matter arose. Specifically the witness was asked if he had investigated the case of a particular inmate who had escaped while serving a life term. The escape evidently took place while the inmate was performing errands outside the prison walls. Portions of the offensive interrogation follow:

Question: Now, what I want to know Doctor, knowing you were going to come back here and testify and knowing that I told you about Lewis Bostick . . . did you investigate it to see whether or not when you send somebody to life imprisonment at the penitentiary, it doesn't really mean they are confined in a cell for the rest of their life, have you investigated that?

Answer: That is really not an area that I have taken as part of my studies.

Question: Well, why wouldn't it, doctor, wouldn't that be important to tell a jury . . . if you tell them they are going to be locked up in a cell the rest of their life, wouldn't it be important to know that that's not a correct statement?

Answer: (No response.)

This identical line of questioning was the subject of exception in State v. Plath, 277 S. C. 126, 140-141, 283 S. E. 2d 221, 229. On that occasion we held the inquiry to be proper as a test of the information upon which the witness based his opinion. After the passage of three years, and in light of the expert's claimed familiarity with the life imprisonment regime, we believe the State and the jury were doubly entitled to know why the witness had not investigated this rather extraordinary episode. His unexplained failure to do so was directly relevant to his credibility as an unbiased social scientist.

Appellants next protest the State's cross-examination of witness Cathy Brazell, a social worker engaged in prison ministry. Mrs. Brazell testified about her religious work with appellant Plath and her belief in the genuine character of his religious conversion. On direct examination she also related that her son had been the victim of a tragic slaying, stressing thereby her belief in prayer and forgiveness. On cross-examination, the State produced a letter written to the Solicitor by the same witness and prompted by her own son's death. In the letter she complained that the multiple murderer, Donald H. "PeeWee" Gaskins, was allowed to move freely about the prison as a messenger boy notwithstanding his compound life sentences. See State v. Gaskins, 270 S. C. 296, 242 S. E. 2d 220.

Appellants strenuously object to this cross-examination and to subsequent jury argument based upon it. They contend the subject matter was irrevlevant and not responsive to any testimony of defense witnesses. They believe themselves to have been prejudiced by the introduction of an arbitrary factor into the sentencing deliberations--that is, speculation as to possible escape or premature release. We find that the record, read as a whole, fails to support appellants' claims.

The course of this trial dramatically demonstrates why this Court has prohibited testimony on the theory and propriety of capital punishment as such. In this case, the defense sought to portray life imprisonment as preferable to capital punishment as a matter of social policy. With the exception of Dr. Neidig's testimony, the entire defense of appellant Arnold was based upon an attempted showing that capital punishment was an ineffective instrument of deterrence, a crude device for expressing social disapproval, and even a counterproductive approach to control of crime. As noted above, defense witness Pearson drew a picture of life imprisonment as slavery, a condition of irretrievable loss which he invited the jury to contemplate through vivid recollection of many years' experience in teaching and counseling inmates of CCI. This testimony was elaborated and bolstered through cross-examinations by counsel for appellant Plath. Parenthetically, we note and reject Plath's inconsistent contention that he was improperly denied a limiting jury instruction on the alternative penalties. We find, moreover, that the trial judge amply explained the binding effect of a jury recommendation in both his jury instructions and in the individual voir dire of jurors.

It is our settled view that such a defense is highly improper, for it invites the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment under our Constitution. In the sentencing phase of a capital case, the jury shall understand the terms "life imprisonment" and "death sentence" in their ordinary and plain meaning without elaboration.

In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection called for by the language of 16-4-20(A), Code, which in pertinent part provides: "A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life. . . ." Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant.

By way of illustration, in State v. Woomer, 278 S. C. 468, 299 S. E. 2d 317, 319, we recently held that psychiatric evidence of future dangerousness was not prejudicial in the circumstances of that case. Subsequently the United States Supreme Count in Barefoot v. Estelle, ___US___, 103 S Ct 3383, 3396, 77 L Ed 2d 1090, 1107, has recognized the utility of such testimony under the view that, "What is essential is that the jury have before it all possible relevant information about the individual whose fate it must determine."

On the other hand, this Court has held irrelevant testimony regarding a defendant's potential adjustment to the controlled environment of life imprisonment. State v. Koon, 278 S. C. 528, 536, 298 S. E. 2d 769, 773. The distinction lies in the lack of logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue. The dividing line is fine indeed, yet not impossible of discernment. A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

It should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial. In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. We read both the State's cross-examinations and subsequent jury arguments in light of the record as a whole. We find nowhere that the Solicitor sought to predict or to argue that these appellants would escape or would be improvidently released. Rather, his argument, particularly in its concluding passage, simply placed before the jury the stark choice between death and life imprisonment, emphasizing that his job was concluded and that the decision was to rest with them. His references to the cross-examinations just discussed strike the candid reader as merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. The State was entitled to make this response. The appellants have shown no prejudice therefrom.

(b) Appellants contend that in the course of his jury summation the Solicitor made prejudicial reference to their failure to testify. This claim takes his arguments out of context and disregards the entire thrust of the defense. From opening argument, through cross-examination of State witnesses to final summation, counsel for both appellants stressed repeatedly the "unfairness" in the prosecution of this case. With indignation they pointed to the grant of immunity received by State's witness, Cindy Sheets, in contrast to the prospect of death for their clients. We cannot fault the defendants for offering to the jury this potentially persuasive argument. By the same token, however, we cannot deny the State an opportunity to explain the development of the case and the absolute necessity for testimony and cooperation by witness Sheets. This was done through examination of witnesses and argument to the jury.

In final summation, the Solicitor did indeed refer to the fact that neither Plath nor Arnold would be testifying in the trial, a statement which drew objection from the defense and a prompt apology to the jury by the Solicitor. We believe that any possible prejudice was cured, and we decline to adopt appellants' view that the Solicitor's apology somehow made matters worse. Beyond this, we note that the jury was amply instructed by the trial court concerning the right of a defendant to remain silent and put the State to its proof. Accordingly we find, in the circumstances, that the Solicitor's argument worked no prejudice to the appellants.

(c) Appellants object to portions of the Solicitor's argument which referred to this Court's decision in State v. Plath, 277 S. C. 126, 284 S. E. 2d 221, particularly as we addressed the jury instruction on kidnapping as delivered in the original trial. Appellants interpret the argument as an effort to invoke the authority of this Court to preclude an independent jury determination on the aggravating circumstance of kidnapping. We find, however, that the passages complained of are not susceptible to this interpretation but are instead simply efforts by the State to explain the function of the jury at this trial and to argue to the jury the elements of kidnapping which the State had sought to prove. We see no way in which the jury in this case could have been misled by these arguments, especially in light of the trial judge's ample instructions both in the course of voir dire and at the conclusion of the evidence.

(d) Finally, appellants complain of rhetorical flourishes engaged in by the Solicitor in his summation, especially his expressed hope that the jurors would have the "guts to do your job." An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one. Finding no prejudice here, we dismiss these claims of error as frivolous.

(4) Aggravating Circumstances.

Appellants complain first that the aggravating circumstance of kidnapping lacked any evidentiary basis in the record. The argument is specious. Section 16-3-910, Code (1982 Supp.), includes among the operative definitions of kidnapping the words "inveigle" and "decoy" along with such terms as "seize," "confine" and "abduct." The statute was read to the jury by the Solicitor and

again read and explained by the trial judge. In its arguments the State emphasized the "confinement" of the victim, a fact sufficiently demonstrated by the testimony to raise a jury question. Such argument would not preclude the jury, however, from finding that the victim was lured--"inveigled" and "decoyed"--to her death by the appellants. If the jurors believed the State's witnesses, the victim was invited into the appellants' car after they had formed and expressed the intention to carry away and murder her.

Appellant Plath claims that the trial judge improperly submitted the aggravating circumstance of "assault with intent to ravish" in light of the fact that the only aggravating circumstance submitted at the original sentencing trial was kidnapping. Section 16-3-20(C), Code, requires the trial judge to submit any statutory aggravating circumstances "which may be supported by the evidence." Appellant argues that the trial judge should sua sponte submit such circumstances of aggravation whether or not suggested by the State. On this premise he reasons that failure of the first trial judge to do so amounted to a finding that the evidence could not support the charge.

We reject this argument for a number of reasons. To begin with, the language of 16-3-20(C), Code, vests the trial judge with no authority or duty to add circumstances of aggravation to those submitted by the State. On the contrary the statute merely directs the trial court not to invade the jury province and not to withhold aggravating or mitigating circumstances which may be supported by the evidence. Williams v. State, 228 S. E. 2d 806 (Georgia). Secondly, we conclude that the evidence amply supported a finding of assault with intent to ravish and that the jury was clearly entitled to consider and find such aggravation in this case. We find no double jeopardy issue. Assault with intent to ravish was never considered by the previous jury, thus precluding any notion that appellant Plath had once been acquitted thereof.

We find no prejudice to appellant Plath from the submission of an additional aggravating circumstance during this sentencing retrial. The function of aggravating circumstances in this State, as in Georgia, is to enable juries to identify death penalty candidates "in an objective, evenhanded, and substantively rational way." Zant v. Stephens, ___ US ___, 103 S Ct 2733, 2744, 77 L Ed 2d 235, 251. The statutory aggravating circumstances represent a legislative determination that certain murders are qualitatively different from all other wrongful killings. These are murders that "shake the conscience of the community." State v. Adams, ___ S. C. ___, 306 S. E. 2d 208, 215.

A jury must find at least one statutory aggravating circumstance or the death penalty shall not be imposed. Section 16-3-20(C), Code. Additional aggravating circumstances provide only alternative bases for placing a defendant in the category of persons subject to capital punishment. Additional aggravating circumstances do not, under our statute, contribute to the actual selection of the death penalty because juries in this State are not instructed to "weigh" circumstances of aggravation against circumstances of mitigation. State v. Shaw, 273 S. C. 194, 205, 255 S. E. 2d 799, 804; State v. Thompson, 278 S. C. 1, 5, 4292 S. E. 2d 581, 584; c.f., Zant v. Stephens, 297 S. E. 2d 1 (Georgia), quoted with approval in Zant v. Stephens, ___ US ___, 103 S Ct at 2739-2741, 77 L Ed 2d at 245-248.

The submission of "assault with intent to ravish" during sentencing retrial in no way prejudiced appellant Plath. Even in the absence of that aggravating circumstance, his sentence of death would receive ample support from the independent finding of kidnapping as an aggravating circumstance. Zant v. Stephens, ___ US ___, 103 S Ct at 2745-2746, 77 L Ed 2d at 253-254.

(5) Proportionality Review.

Sentences of death imposed upon appellants Plath and Arnold for this aggravated murder must be sustained in light of the crime and the individual defendants. In April 1978, the appellants came to South Carolina from Pennsylvania accompanied by two female juveniles. On the morning of April 12th, the foursome offered a ride to the victim, a black lady who was hitch-hiking to work. After leaving her at a point along the road, the appellants returned and invited her back into the car. Appellant Arnold had already expressed his desire to kill the victim because he "didn't like niggers."

The party then drove to a remote dump site where the crime was committed. Testimony revealed that the victim was beaten and kicked, cursed and otherwise verbally abused. She was forced to strip naked, to perform acts of oral sex upon Plath and upon one of the young females, all the while being beaten. Plath urinated in the mouth of the victim, demanding that she swallow his urine. There then followed a killing of incomprehensible savagery. The victim was beaten, kicked, stamped and jumped upon, choked (with a belt and rubber hose), and stabbed (with a pocket knife and broken bottle).

By way of mitigation, an expert witness for Arnold testified that a facial birthmark and other personality disorders led him to this crime. The same expert testified also that Arnold knew the difference between right and wrong. Plath offered testimony to his unhappy childhood with an allegdly drunken divorced mother and without positive male guidance during his formative years. Plath also submitted evidence of his religious activities described above. The State countered, in part, with Plath's previous admission that he had been wearing a cross at the time of this crime.

The jury was appropriately instructed to consider all evidence in mitigation. We are satisfied that the jury was disposed to and did in fact give every beneficial consideration to which these appellants were entitled. The trial judge noted for the record that some jurors shed tears at the announcement of the verdicts. Yet when polled, none wavered in holding to the decisions. The trial judge found that the verdicts were supported by the evidence and were not based on passion, prejudice or any other arbitrary factor. We agree and add that the recommended sentences are wholly commensurate with this crime. Lacking precisely identical cases with which to compare these verdicts, we are convinced that the sentence of death is neither excessive nor disproportionate in light of this crime and these defendants. The atrocious nature of this murder resembles in some respects the cases of State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799, and State v. Woomer, 278 S. C. 468, 299 S. E. 2d 317. As in those cases, the sentences of death are affirmed.

LITTLEJOHN, NESS, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

February 10, 1984

William Isaac Diggs, Esquire
Office of Appellate Defense
Suite 301, 1122 Lady St.
Columbia, South Carolina 29201

David I. Bruck, Esquire
1413 Calhoun St.
Columbia, South Carolina 29201

Re: The State v. John H. Plath and John D. Arnold

Gentlemen:

The Court has this day refused your Petitions for Rehearing in the above case in the following order:

"Petitions denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

February 10, 1984"

The remittitur is being sent down today.

Very truly yours,

CLERK

CND,Jr/lbb

cc: Joseph R. Barker, Esquire
Peter L. Fuge, Esquire
Ralph V. Baldwin, Jr., Esquire
C. Scott Graber, Esquire
The Honorable Harold M. Coombs, Jr.

S.C. Code §§16-3-20 et seq.

S.C. Code §16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The person committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the

case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding

correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

83-6567

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

JOHN DAVID ARNOLD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, John David Arnold, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

WILLIAM ISAAC DIGGS

South Carolina Office of
Appellate Defense
Suite 301, 1122 Lady St.
Columbia, SC 29201

Counsel for Petitioner.

April 10, 1984.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

JOHN DAVID ARNOLD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF JOHN DAVID ARNOLD
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, John David Arnold, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account? NO.

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO.

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John D. Arnold Jr.
John David Arnold

SWORN TO and subscribed before me
this 9th day of April, 1984.

Notary Public for South Carolina
My Commission Expires: 4/24/87.